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STATEMENT OF FACTS[1]

I Introduction.

In this appeal, the respondents are two professional women, Mildred Jamison and Betty Dotson, who for more than three years have been listed in Missouri's central registry system as persons against whom there were probable cause findings of child neglect.

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[1] The facts in this case are not in dispute. The statement of facts in this brief will not use extensive citations, as the facts are compactly contained in 44 paragraphs in Respondents' two statements of uncontroverted material facts. Respondents' Supplemental LF ("RSLF") 1-13 and 24-43. The Division did not respond to either of these factual statements with any "demonstrat[ion of] specific facts showing that there [was] a genuine issue for trial." *See* Mo. R. Civ. P. 74.04(c)(2). On July 28, 2005, Jamison and Dotson filed their Second Amended Motion for Summary Judgment (LF 5, 32-36), along with their Amended Statement of Uncontroverted Facts and their Legal Memorandum (LF 5; RSLF 1-23). On September 1, 2005, they filed additional uncontroverted facts. LF 5; RSLF 24-43. Apparently, the only response the Division actually filed was the Sur-reply to these additional facts, on September 16, 2005. LF 5; RSLF 44-47. However, on August 16, 2005, the Division had served counsel with responses to their Second Amended Motion, apparently without filing them. They will be provided if requested.

On November 3, 2005, the respondents won their *de novo* appeal in the Cole County Circuit Court, which entered summary judgment declaring that it is unconstitutional to maintain the names of persons in the child abuse and neglect central registry, for purposes of dissemination to prospective employers, without first affording such persons the opportunity of a full due process hearing. To the extent Missouri's Child Abuse Act (the "Act") is used this way, the circuit court declared it to be unconstitutional under the due process guarantees of the Fourteenth Amendment to the U.S. Constitution and Article 1, §§ 2 and 10 of the Missouri Constitution, both facially and as applied. The trial court stayed these rulings pending appeal. Order and Judgment, Appellant's Appendix 22-31.

II Parties On Appeal.

The appellant is the Children's Division ("Division"), a sub-agency of the Department of Social Services, State of Missouri. Mo. Rev. Stat. § 207.010. The Department of Social Services is an agency in the executive department of the State of Missouri. Mo. Const. art. IV, §§ 12, 37; Mo. Rev. Stat. § 610.010. At the times relevant to this proceeding, the Children's Division was known as the Division of Family Services.

Respondent Mildred Jamison resides in Florissant, Missouri. She is a registered nurse and the founder and chief executive officer of Faith House.

Respondent Betty Dotson resides in St. Louis, and is a licensed practical nurse. At all relevant times, Dotson was an employee of Faith House.

III Faith House.

Mildred Jamison founded Faith House in 1991. Faith House was the first child care agency in the state of Missouri to care for children prenatally exposed to drugs. As a registered nurse, Jamison witnessed the suffering of infants born addicted to drugs and alcohol. She wanted to do something to help these children and others in similar positions. The goal of Faith House is to help the children transition into regular classrooms and foster or adoptive families. It also assists biological parents coping with the demands of child care. Ultimately, Faith House hopes that the children become productive citizens in our community. Faith House operates a children's day care, and a residential care facility called "Dream House" for teenagers with Human Immunodeficiency Virus ("HIV"). It is licensed as a child-care center and a residential child-care agency. RSLF 2.

Faith House cares for children without homes. Many of these children have troubled backgrounds, including histories of abuse and prenatal exposure to drugs. The teenagers with HIV may have never lived in an environment where they can develop a sense of self-worth. RSLF 2-3.

IV Procedures Followed to Determine Probable Cause.

The Division investigates reports of child abuse and neglect pursuant to Mo. Rev. Stat. §§ 210.109-165, and an investigator initially determines whether "probable cause"[2] exists to believe that a "child" has been "neglected" or "abused." The investigator's initial determinations are subject to internal review by a low-level supervisor. 13 CSR 40-31.025; RSLF 3.

The Division's determinations are also subject to further internal review by the Division's Child Abuse and Neglect Review Board ("CANRB"). Mo. Rev. Stat. §§ 210.152.3-.4; 13 CSR 40-31.025. The CANRB determines whether the Division's determinations are "supported by evidence of probable cause" and are "not against the weight of such evidence." Mo. Rev. Stat. § 210.152.4. The hearing before the CANRB, a group of volunteers appointed by the Governor (Mo. Rev. Stat. § 210.153), is a non-contested case. RSLF 3.

In proceedings before the CANRB, the accused citizen cannot compel attendance of witnesses and cannot cross-examine witnesses, statements are not required to be made under oath, and hearsay may be considered. RSLF 3.

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[2] Prior to August 28, 2004, this finding was based, as it was here, on a "probable cause" standard. For cases arising after August 28, 2004, it is to be based on a "preponderance of the evidence" standard. Mo. Rev. Stat. § 210.110(2) (as amended).

If the decision of the CANRB aggrieves the alleged perpetrator, that person can petition for *de novo* judicial review within sixty days of notification of the CANRB's decision. Mo. Rev. Stat. § 210.152.5. In the *de novo* judicial proceeding, the court independently determines whether "probable cause" exists to believe that the alleged perpetrator "abused" or "neglected" a child. RSLF 4.

In the *de novo* judicial proceeding, the alleged perpetrator cannot subpoena the alleged victim or the reporter. Mo. Rev. Stat. § 210.152.5; RSLF 4.

V Child Abuse and Neglect Registry.

The Division maintains a "central registry . . . of persons where the division has found probable cause to believe or a court has substantiated through court adjudication that the individual has committed child abuse or neglect. . . ." Mo. Rev. Stat. §§ 210.109, 210.110(2). Information in the central registry is nominally confidential, but numerous exceptions permit dissemination of the information to employers, "bona fide" researchers, state licensing authorities, and others. Mo. Rev. Stat. § 210.150. Pursuant to Mo. Rev. Stat. § 210.150.2, the division is required to disclose the names contained in the central registry to various individuals and entities. They are listed here, with the names of persons and entities whose access to registry information may be limited by the circuit court's decree in the instant case highlighted in bold-face italics:

(1) Appropriate federal, state or local criminal justice agency personnel, or any agent of such entity, with a need for such information under the law to protect children from abuse or neglect;

(2) A physician or a designated agent who reasonably believes that the child being examined may be abused or neglected;

(3) Appropriate staff of the division and of its local offices ***;

(4) Any child named in the report as a victim, or a legal representative, or the parent, if not the alleged perpetrator, or guardian of such person ***;

(5) Any alleged perpetrator named in the report ***;

(6) A grand jury, juvenile officer, prosecuting attorney, law enforcement officer involved in the investigation of child abuse or neglect, juvenile court or other court conducting abuse or neglect or child protective proceedings or child custody proceedings, and other federal, state and local government entities, or any agent of such entity, with a need for such information in order to carry out its responsibilities under the law to protect children from abuse or neglect;

(7) ***Any person engaged in a bona fide research purpose***, with the permission of the director ***;

(8) ***Any child-care facility; child-placing agency; residential-care facility, including group homes***; juvenile courts; ***public or private elementary schools; public or private secondary schools; or any other public or private agency exercising temporary supervision over a child or providing or having care or custody of a child who may request an examination of the central registry from the division for all employees and volunteers or prospective employees and volunteers, who do or will provide services or care to children. Any agency or business recognized by the division or business which provides training and places or recommends people for employment or for volunteers in positions where they will provide services or care to children may request the division to provide an examination of the central registry***. ***;

(9) ***Any parent or legal guardian who inquires about a child abuse or neglect report involving a specific person or child-care facility who does or may provide services or care to a child of the person requesting the information***. ***;

(10) ***Any person who inquires about a child abuse or neglect report involving a specific child-care facility, child-placing agency, residential-care facility, public and private elementary schools, public and private secondary schools, juvenile court or other state agency.*****;**

(11) Any state agency acting pursuant to statutes regarding a license of any person, institution, or agency which provides care for or services to children;

(12) Any child fatality review panel***;

(13) ***Any person who is a tenure-track or full-time research faculty member at an accredited institution of higher education engaged in scholarly research, with the permission of the director***. ***.

Mo. Rev. Stat. § 210.152.2 (emphasis added).

Child care providers and other employers **must** screen their employees to determine whether they have committed neglect, using the central registry. *See, e.g.*, 13 CSR 40-71.030(1)(A)5; 19 CSR 30-62.102(1)(k).

Employees who have been found to have committed neglect may be prohibited from working with children. *Id*. Nurses may be disciplined by the Board of Nursing if they are placed on an employee disqualification list such as the central registry. Mo. Rev. Stat. § 335.066.2(15).

The Division's practice is to include an alleged perpetrator's name in the central registry based on an initial probable cause finding by its investigator. The Division lists the alleged perpetrator in the central registry before the internal administrative review process is completed, before the hearing at the CANRB, and before a court conducts a *de novo* review. RSLF 5.

In 2002, the CANRB reversed about 35 to 40 percent of the probable cause determinations that were appealed to it. The Division does not keep statistics on the percentage of cases that are reversed at the initial administrative review or at the judicial level, but cases are also overturned at each of those levels. The total percentage of reversals of probable cause determinations has been 40 percent or greater. RSLF 24-43.

VI Probable Cause Finding Against Jamison And Dotson.

On January 29, 2003, investigator Donna Sheffer of the Division's Out of Home Unit ("OHI Unit") completed a report ("Sheffer's report"[3]) on behalf of the Division that alleged "probable cause" for "neglect" of D.C., C.A., and D.V.[4] by

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[3] A document purporting to be Sheffer's report, along with other documents purporting to be part of the Division's file, were "inserted" into the "record" by the Division for the first time on April 4, 2006, as part of Appellant's Brief Appendix filed with Appellant's Brief, in this Court. Accordingly, unless requested to respond by the Court, respondents will ignore this seemingly unorthodox attempt to introduce evidence after an appeal has been taken and the record closed.

[4] D.C., C.A., and D.V. are children. Their legal names are known to the Division and the respondents, but are abbreviated in these proceedings to protect the privacy of the children.

Mildred Jamison and Betty Dotson. Sheffer's report did not allege that Jamison or Dotson "abused" any of the children at Faith House at any time. At this point, consistent with its normal practice, the Division entered the names of Mildred Jamison and Betty Dotson into the central registry. This listing occurred before there was any hearing. RSLF 5.

By letter dated March 28, 2003, Jamison and Dotson requested review by the OHI Unit Manager. By letters dated April 2, 2003, OHI Unit Manager Rick Hill notified counsel for Jamison and Dotson that he was upholding the Division's findings of probable cause. He forwarded the case to the CANRB, and Jamison and Dotson requested administrative review by the CANRB of the Division's determinations of probable cause. RSLF 5-6.

By letters dated August 11, 2003, the CANRB upheld the Division's determinations of probable cause to believe that Jamison and Dotson had "neglected" D.C., C.A., and D.V. RSLF 6.

VII Injuries To Jamison And Dotson.

The Division's neglect determination damaged Jamison's and Dotson's personal and professional reputations. Since Jamison has been listed in the registry, the Missouri Department of Health and Senior Services ("DHSS") has advised Faith House that Jamison "may not be present during hours of operation." However, a DHSS employee advised Jamison that DHSS would not take any

action while the matter was being appealed. Jamison does not know whether the Division or some other state agency will take some action against her or Faith House while the appeal is pending. This uncertainty has called into question her role at Faith House. RSLF 6.

Moreover, the Division's neglect determination prevents Jamison from obtaining employment with troubled children—a field where she has concentrated her energies and has a long history of service—and threatens her nursing license. Thus, Jamison's personal reputation, her economic livelihood, and the charitable organization she has worked to build are all harmed by the Division's determination of neglect. RSLF 7.

Likewise, the Division's neglect determination and listing of Dotson in the registry limits her ability to obtain employment and could lead to discipline of her nurse's license. Because of these severe effects, Dotson's ability to earn a living and support herself has been negatively affected. The future of her nursing career is uncertain. RSLF 7.

The Division's determination of neglect has irreparably harmed Jamison and Dotson and continues to do so. RSLF 7.

ARGUMENT

In this case, the Court is asked to review whether a lower-level government investigator, exercising virtually unbridled discretion, unrestrained by rules of evidence, and using a standard of proof which until now has not even required him or her to believe that it is more likely than not that a citizen has committed child abuse or neglect, should be permitted to place that citizen's name in Missouri's central registry as one who abuses or neglects children, and make it available to such persons as potential employers, prior to the citizen's right to be heard in a meaningful manner. For more than three years, respondents' names have remained in the central registry, placed there initially on the word of a single government investigator.

What is not at stake in this appeal is the protection of Missouri's abused or neglected children. No child *in extremis* is endangered by the trial court's opinion, nor does the central registry serve any function in regards to the emergency removal of children from an abusive or neglectful environment. Under Missouri law, emergency removals of children are accomplished by others—physicians, law enforcement officers and juvenile authorities—often with the help of the Division. These emergency removals or other provisions are made weeks before any determination has been made as to whether an individual should be included in the central registry. Nor does the trial court's judgment impede maintenance of a

central registry or sharing of information in it with law enforcement or child protection authorities.

Standard of Review

Since this was a court-tried case, the trial court's judgment "will be sustained by the appellate court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Since what is being appealed here is a summary judgment, the only issues are whether the circuit court erroneously declared or applied the law.

I The Missouri Central Registry Scheme Is Unconstitutional Under The Due Process Clauses Of The United States And Missouri Constitutions Because It Satisfies The "Stigma Plus" Test In That It Causes Not Only Injury To Reputation But In Addition Places A Burden On Employment Without First Providing Procedural Due Process.

When making a federal procedural due process claim, the parties advancing the claim must demonstrate that they possess a constitutionally protected interest in life, liberty or property, and that state action has deprived them of that interest. U.S. Const. Amend. XIV, § 1. In evaluating a procedural due process claim, the

courts typically use a two-step analysis: (1) whether parties advancing the claim were deprived of a constitutionally protected liberty or property interest; and (2) if so, what process was due. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (quoting *Morrissey v. Brewer*, 408 U.S. 471 (1972)). The second question—what process is due—is addressed in Part II *infra*.

The circuit court found that the central registry system is unconstitutional to the extent that it burdens employment, but the circuit court explicitly did nothing to affect:

> 1) the State's right to maintain a public list of convicted child abusers, as is already done with respect to sex crimes, 2) the State's right to maintain a public list of individuals who have been charged with crimes of child abuse, and 3) the State's right to maintain an internal list of suspected child abusers to aid law enforcement in criminal investigations.

Order and Judgment, LF 22.

In determining whether there is a constitutionally protected interest, the parties agree that the point of departure is *Paul v. Davis*, 424 U.S. 693 (1976), a federal class action tort claim under 42 U.S.C. § 1983 against police chiefs who had distributed flyers to 800 merchants identifying certain individuals as shoplifters. The Supreme Court, in its ongoing battle to thwart efforts to "make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever

systems may already be administered by the States" (*Id.* at 701), held that "if a government official defames a person, **without more**, the procedural requirements of the Due Process Clause of the Fourteenth Amendment" are not brought into play (*Id.* at 708; emphasis added). "We have noted," the Court said, "the 'constitutional shoals' that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law." *Id.* at 701. The Supreme Court noted that its case law did "not establish the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause." *Id.*

What began in *Paul v. Davis* as the Supreme Court's restriction against using the federal civil rights laws as a means to sue local officials for mere defamation later became known by lower federal courts and state courts as the "stigma plus" requirement.[5] It is now "well established that damage to a person's

[5] While "stigma plus" has thus become widely accepted as a test under the U.S. Constitution, individual respondents are unaware of any Missouri case holding that, in this particular area, interpretations of the due process provisions of the Missouri Constitution are coterminous with the U.S. Constitution. *Cf.* Appellant's carefully-worded suggestion that "Missouri's Due Process Clause is interpreted similarly to the federal Due Process Clause. *See, e.g., Moore v. Board of Educ.,* 836 S.W.2d 943 (Mo. banc 1992)." Appellant's Br. 23. But *Moore v. Board of*

reputation alone is not sufficient to implicate a Federal liberty interest." *See e.g.*, *Cavarretta v. Department of Children and Family Services*, 660 N.E.2d 250, 254 (Ill. App. 2 Dist. 1996) *citing Paul v. Davis*, 424 U.S. 693, 701 (1976). However, loss of reputation coupled with some other tangible element can rise to the level of a protectible liberty interest, known as "stigma plus." *Valmonte v. Bane*, 18 F.3d 992, 999 (2d Cir. 1994); *Dupuy v. Samuels*, 397 F.3d 493, 511 (7th Cir. 2005).

A The "Stigma" Element Of The "Stigma Plus" Requirement Is Satisfied By The Missouri Central Registry Scheme.

There is no dispute that persons whose names are placed on the child abuse registry suffer a stigma, *i.e.*, "public opprobrium" and a loss of reputation. *See e.g. Valmonte*, 18 F.3d at 999-1000; *Lee T.T. v. Dowling*, 664 N.E.2d 1243, 1250 (N.Y. App. 1996) (branding an individual a child abuser certainly calls into question that individual's "good name, reputation, honor, or integrity").

In Missouri, access to information contained in the central registry is available to a wide range of persons and organizations, far exceeding what is necessary for law enforcement or child protection purposes. According to the statute, dozens of persons and entities, many of whom have no law enforcement or

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Educ. is only an example of a similar interpretation. It does not announce any rule of general applicability.

child protection function, have access to investigative records contained in the central registry. Mo. Rev. Stat. § 210.152.2 (emphasis added). In addition, under Missouri's Family Care Safety Act, the inclusion of a person's name in the central registry will be disclosed to *anyone* screening or interviewing an individual for a position in child-care, elder-care or personal-care, as well as to anyone contemplating the placement of an individual in a child-care, elder-care or personal-care setting. Mo. Rev. Stat. § 210.921.

The Family Care Safety Act also provides as follows: "For purposes of providing background information pursuant to sections 210.900 to 210.936, reports and related information pursuant to sections Mo. Rev. Stat. §§ 198.070 and 198.090, sections 210.109 to 210.183, section 630.170, and sections 660.300 to 660.317, **shall be deemed public records**." Mo. Rev. Stat. § 210.936 (emphasis added).

B The "Plus" Element Of The "Stigma Plus" Requirement Is Satisfied By The Missouri Central Registry Scheme.

The "plus" element of "stigma plus" does not require the existence of a separate, stand-alone constitutional right. If that were the case, the right to procedural due process would be premised on this stand-alone right, and there would be no need at all for the "stigma plus" doctrine. The cases have found the "plus" requirement to be satisfied in many different ways, but the common

denominator is that the government must be found to have done something beyond mere defamation.

1 The Accused Have A Constitutionally Protected Interest When The Government Goes Beyond Mere Defamation.

In *Valmonte v. Bane*, 18 F.3d 992 (2d Cir. 1994), the Second Circuit held that a constitutional deprivation occurred when employers in New York were required to consult the state's registry before hiring an individual and provide the state with a written explanation as to why they chose to hire that individual if his or her name was included.[6] *Id.* at 1002. While the court did not exclude the possibility that a lesser burden on employment prospects would have sufficed, its holding was simply that having to consult the registry, and submit an explanation as to why it hired someone named in it, constituted a burden sufficient to invoke the requirements of procedural due process under the Fourteenth Amendment.

In *Dupuy v. Samuels*, 397 F.3d 493 (7th Cir. 2005), the Seventh Circuit upheld a finding "that child care workers are effectively barred from future

[6] In Part (2) *infra*, respondents discuss the Missouri requirement, when federal or state funds are at stake, that such an explanation not only be offered, but also accepted, by the State. Mo. Rev. Stat. § 210.025. In *Valmonte*, there was no requirement that the State accept the explanation. In such cases, the burden imposed by the Missouri statute is more onerous than by the New York statute.

employment in the child care field once an indicated finding of child abuse or neglect against them is disclosed to, and used by, licensing agencies and present or prospective employers." *Id.* at 503. "Such circumstances," said the court, "squarely implicate a protected liberty interest." *Id.*

At least one court has suggested that inclusion in a state registry identifying one as a child abuser "may well be viewed, in and of itself, as satisfying the stigma plus standard." *See Anonymous v. Peters*, 730 N.Y.S.2d 689, 693 (N.Y. 2001).

Various courts have also concluded that "stigma plus" exists because the inclusion of an individual on the state registry of suspected child abusers effectively precludes that individual from working in any capacity in the child care profession. For example, in *Anonymous*, the plaintiff, who among other things was seeking to have his name expunged from the New York central registry, argued that "stigma plus" existed because a decision to seek employment in child care or another line of work involving children would essentially trigger statutory disclosure of his inclusion in the registry. *Id*.

In *Cavarretta v. Department of Children and Family Services*, 660 N.E.2d 250 (Ill. App. 2 Dist. 1996), the Illinois Court of Appeals concluded that impairment of future employment prospects was sufficient to implicate a federal liberty interest. The court noted that an individual placed on the state's registry could be prohibited from working in professions such as child care and teaching.

Id. at 254. As in Missouri (see Part (2) *infra*), under the Illinois Child Care Act of 1969, the Department of Children and Family Services could revoke or refuse to renew the license of any child care facility should the facility fail to discharge an employee or volunteer who had been the subject of an "indicated" report of child abuse. *Id.*

In *Lee T.T. v. Dowling*, 664 N.E.2d 1243 (N.Y. 1996), New York's highest court held as follows:

> The potential loss of employment as either a child psychologist or a foster parent, or of the right to pursue adoption of a child are substantial interests. The government's characterization of petitioners as child abusers affects not only their present employment in the child care field or as foster parents; it effectively bars them from obtaining similar employment or benefits in the future.

Id. at 1250.

Outside the area of child abuse and neglect central registries, other courts have found that similar registries for sexual offenders trigger procedural due process, even after a criminal conviction. In *Brummer v. Iowa Dept. of Corrections*, 661 N.W.2d 167 (Ia. 2003), the Iowa Supreme Court held that "[a] liberty interest is at stake whenever a sex offender risk assessment is conducted in Iowa":

[A]fter completing the assessment and notifying an offender of the results, and pending limited appellate procedures, the individual's status as a convicted sex offender *together with* an additional classification of his risk to reoffend, can be transmitted, in varying extent and degree, to different members of the public. This entire process clearly implicates a liberty interest in that it threatens the impairment and foreclosure of the associational or employment opportunities of persons who may not truly pose the risk to the public that an errant risk assessment would indicate. Ultimately, we believe the Oregon Supreme Court best explained this concept in the course of its consideration of an issue similar to the one presented here:

> When a government agency focuses its machinery on the task of determining whether a person should be labeled publicly as having a certain undesirable characteristic or belonging to a certain undesirable group, and that agency must by law gather and synthesize evidence outside the public record in making that determination, the interest of the person to be labeled goes beyond mere reputation. The interest cannot be captured in a single word or phrase. It is an interest in knowing when the government is moving against you and why it has singled you out for special attention. It is an interest in avoiding the

> secret machinations of a Star Chamber. Finally, and most importantly, it is an interest in avoiding the social ostracism, loss of employment opportunities, and significant likelihood of verbal and, perhaps, even physical harassment likely to follow from designation. In our view, that interest, when combined with the obvious reputational interest that is at stake, qualifies as a "liberty" interest within the meaning of the Due Process Clause.
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> *Noble v. Bd. of Parole & Post-Prison Supervision*, 327 Or. 485, 964 P.2d 990, 995-96 (1998).

Brummer v. Iowa Dept. of Corrections, 661 N.W.2d at 174-175. In *State v. Robinson*, 873 So. 2d 1205, 1214 (Fla. 2004), the Florida Supreme Court noted that "designated sexual predators are subject to social ostracism, verbal (and sometimes physical) abuse, and the constant surveillance of concerned neighbors. These additional limitations implicate more than merely a stigma to one's reputation." In *Gwinn v. Awmiller*, 354 F.3d 1211, 1224 (10th Cir. 2004), the court of appeals held that a "false statement" by the government plus being "required to register as a sex offender" satisfied the applicable "stigma-plus" standard.

2 Missouri's Central Registry Scheme Goes Well Beyond Mere Defamation.

Under Mo. Rev. Stat. § 210.025.3(1), "an applicant shall be denied state or federal funds for providing child care [in the home] if such applicant or any person over the age of eighteen who is living in the applicant's home . . . [h]as had a probable cause finding of child abuse or neglect pursuant to section 210.145." While applicants may offer extenuating or mitigating circumstances to the state, all the statute promises is that such an offer "may be considered." Mo. Rev. Stat. § 210.025.4. In *Valmonte v. Bane*, 18 F.3d 992 (2nd Cir. 1994), the Second Circuit concluded that the "plus" element of "stigma plus" was satisfied by the fact that employers in New York were not only required to consult the registry before hiring an individual, but were also required to provide the state with a written explanation as to why they chose to hire that individual. *Id.* at 1002. It was not necessary in *Valmonte* for such an explanation to be acceptable to the state. In Missouri, for an employer to be eligible for state or federal funds, the explanation must be acceptable to the state. Accordingly, where state or federal funds are at issue, the burden on employment in Missouri is immeasurably greater than it was in *Valmonte.*

In Missouri, even a child-care facility that is exempt from the licensing requirements must conduct a check of the central registry for each individual

caregiver and all other personnel at the facility. Such facilities are required to provide notice to all parents that includes a representation that a background check has been conducted on all caregivers and other personnel. Mo. Rev. Stat. § 210.254.2.

Under Missouri's Family Care Safety Act (Mo. Rev. Stat. §§ 210.900 *et seq.*), every child-care worker or elder-care worker hired by a child-care facility (whether licensed or license-exempt) must register with the Department of Health and Senior Services. Part of the registration process involves a background screening that includes a check of the child abuse central registry, and the registration form. Mo. Rev. Stat. § 210.906. All applicants must consent to background checks and to release of information contained in the background check. Mo. Rev. Stat. §§ 210.906 and 210.909. The inclusion of a person's name in the central registry will be disclosed to *anyone* screening or interviewing an individual for a position in child-care, elder-care or personal-care, as well as to anyone contemplating the placement of an individual in a child-care, elder-care or personal-care setting. Mo. Rev. Stat. § 210.921.

Many child-care providers or employers are required to be licensed by the Children's Division of the Department of Social Services. Mo. Rev. Stat. § 210.516. The department may prohibit any person found in the central registry from being present in any licensed family day care home, group day care home or

child day care center during child-care hours. 19 C.S.R. 30-61.105; 19 C.S.R. 30-62.102. The Department may deny or revoke licenses to any child-placing agency which employs persons who abuse or neglect children or are the subject of multiple reports of child abuse or neglect which upon investigation results in a finding of probable cause to suspect child abuse or neglect. 13 C.S.R. 40-73.017. At licensed facilities, if any report exists for which the investigator found "probable cause" of abuse or neglect, the Department of Health may prohibit the alleged perpetrator from being present in the facility during child care hours. 19 CSR 30-62.102(1)(K). The regulations do not specify any standard by which the Department of Health is to make this determination. Nor do they provide for any appeal of a determination that the alleged perpetrator may not be present in the facility.

The results of child abuse and neglect background screenings must be maintained in the files of any facility applying for annual fire safety and health and sanitation inspections. 19 C.S.R. 30-60.020.

On page 27 of its brief, Appellant asserts that "Missouri's registry-checking requirements do not impose a burden on present or future employment." This is flatly wrong. *See, e.g.*, discussion of Mo. Rev. Stat. § 210.025 at the beginning of this subsection (2).

But even apart from the outright prohibitions of employment pursuant to Mo. Rev. Stat. § 210.025, the entire central registry scheme was designed with the obvious purpose and effect of discouraging the employment of persons named therein by any child-care or elder-care facility. Appellant cannot argue that the central registry scheme is an essential means to the goal of protecting children on one hand but then insist that it is not effective in discouraging prospective child-care employers from employing citizens whose names are on the list. Appellant cannot have it both ways. The Second Circuit was more forthright when it noted that New York's law had a purpose "to ensure that individuals on the Central Register do not become or stay employed or licensed in positions that allow substantial contact with children" unless the employer is aware of their status. *Valmonte,* 18 F.3d at 995. Exactly the same can be said about the Missouri central registry scheme.

The Division argues that *Valmonte* is distinguishable because an employer in New York had to maintain a written record as to why any person it hired whose name was on the registry was determined by the employer to be appropriate for working in the child or health care field. Appellant's Br. 28. The Division argues that *Dupuy v. Samuels,* 397 F.3d 493 (7th Cir. 2005), is also distinguishable because in Illinois, an employer is required to notify the Division of Children and Family Services if it has hired someone on the registry. But these are distinctions

without differences. The question is not whether an employer is required to spend five minutes mailing a note to the Division notifying it that a hire had been made (*Dupuy*) or to maintain the kinds of files that any employer anywhere would keep on an employee whose name was on the central registry (*Valmonte*). The question is rather the extent to which the statutory schemes burden employment or employment prospects. It is not the minor additional administrative details in New York and Illinois that create the bar to future employment, but rather the forced dissemination to employers of the fact that a citizen's name is on the central registry. **That** is what creates the impediment—in New York, Illinois or Missouri.

The Seventh Circuit held that "placement of an individual's name on the central registry does more than create a reputational injury. It places, by operation of law, a significant, indeed almost insuperable, impediment on obtaining a position in the entire field of child care." *Dupuy v. Samuels*, 397 F.3d at 511. The Division has agreed that "the *Dupuy* [c]ourt also recognized that it was the section of the Illinois child abuse law that required employers to consult the registry, which implicated a liberty." Appellants Br. 36. Exactly the same is true of the Missouri statutory scheme. In Missouri, as in New York and Illinois, potential employers are required to consult the central registry before making a hire. *See, e.g.*, Mo. Rev. Stat. § 210.254.2 (even unlicensed institutions must consult the registry).

C There Is No Need To Wait Until An Actual Loss Of Employment Or Other Injury Occurs.

To establish a constitutionally protected interest it is not necessary that the individual whose name has been placed in the central registry actually suffer a loss of employment or other injury. *See Valmonte*, 18 F.3d at 999 (Individual whose name was placed in central registry does not need to "'await the consummation of threatened injury to obtain preventative relief,'" *citing Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923)). An individual's claim is ripe "if the perceived threat due to the putatively illegal conduct of the appellees is sufficiently real and immediate to constitute an existing controversy." *Valmonte*, 18 F.3d at 999. Career entrants, not just those already employed, have been granted standing to make the procedural due process claim advanced here. *Dupuy*, 397 F.3d at 512.

Several courts have concluded that a sufficiently real and immediate threat of injury exists based on the impairment of an individual's future employment prospects even if that individual has not yet suffered an adverse employment decision as a result of being included in the registry. *See Cavarretta*, 660 N.E.2d at 254-55 (fact that placement of plaintiff's name in registry had not yet resulted in adverse employment decision did not negate plaintiff's due process rights; inclusion in the registry placed a tangible burden on plaintiff's employment prospects); *Valmonte*, 18 F.3d at 999 (individual's presence on the central register

was direct threat not only to her reputation but also to her employment prospects); *Anonymous v. Peters*, 730 N.Y.S.2d 689 (N.Y. 2001) (hypothetical impediment to plaintiff's ability to seek employment in childcare or ability to adopt a child sufficient to satisfy "stigma plus" standard).

II The Missouri Central Registry Scheme Is Unconstitutional Under The Due Process Clauses Of The United States And Missouri Constitutions Because It Does Not Provide The Process That Is Due.

To establish that a regulatory scheme is unconstitutional, there must not only be a constitutionally protected liberty or property interest; it must also be shown that the procedural safeguards established by the state are insufficient to protect that interest. *Valmonte*, 18 F.3d at 1002. The amount of process that is due depends on a balancing of (1) the private interest affected by the state's action; (2) the risk of erroneous deprivation of that interest under the existing procedure and the value of any additional procedural safeguards, and (3) the governmental interest involved. *See Valmonte*, 18 F.3d at 1003, *citing Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

There is little dispute that both the private interest affected by the state's action and the governmental interest are substantial. The individual has an interest in securing future employment in the child-care field, free from the restrictions imposed by the scheme created by the state to discourage the realization of those

interests. *Valmonte*, 18 F.3d at 1003. The state, as *parens patriae*, has a significant interest in protecting children from abuse and maltreatment. *Id.* *See also Petition of Preisendorfer*, 719 A.2d 590, 593 (N.H. 1998) (both state and individual listed on child abuse registry assert compelling interests).

Where both sides assert compelling interests, the critical factor becomes the risk of erroneous deprivation of the liberty interest at stake. *Valmonte*, 18 F.3d at 1003; *Preisendorfer*, 719 A.2d at 593. As demonstrated in Part I *supra* and in Part II(A) immediately *infra*, the current Missouri statutory scheme substantially impairs compelling interests of private citizens. Part II(B) discusses several elements of the current Missouri statutory scheme that create an enormous risk of error. That part also demonstrates the value to all concerned of additional procedural safeguards. Part II(C) demonstrates how the state's interest, while compelling, would not be impaired by providing private persons the process that is due.

A The Private Interests Are Compelling, Including The Right To Pre-Deprivation Due Process.

Much of what could be addressed here has already been discussed in Part I, which shows that the Missouri statutory scheme inflicts "stigma plus" on persons whose names are placed in the registry. This subpart addresses several additional

arguments advanced by appellant (Appellant's Brief 55-57) regarding the private interests affected.

The relevant issue here, in which the question regards the constitutionality of the Missouri statutory scheme, is whether a constitutionally significant period of time elapses between placement on the list and a due process hearing. This the Court can, and should, decide on the basis of a fair reading of the statute and facts about which it can take judicial notice.

Once an investigation is opened, the division must complete its investigation within 30 days unless it can articulate good cause for keeping the investigation open. Mo. Rev. Stat. § 210.145. The alleged perpetrator must be notified of the division's determination—either that probable cause exists or that the report is unsubstantiated—within 90 days of the date of the report. The alleged perpetrator then has 60 days to request an administrative review. Within 15 days of such a request, the county director must decide whether to uphold the probable cause finding. The alleged perpetrator then has an additional 30 days to request review before the CANRB. Mo. Rev. Stat. § 210.152. Thus, approximately 6½ months after the report is made, and months after the "probable cause" determination becomes part of the central registry, the alleged perpetrator can first request a hearing before the CANRB.

As detailed in the Statement of Facts *supra*, very little process is provided the accused at the hearing before the CANRB. The accused citizen cannot compel attendance of witnesses and cannot cross-examine witnesses, statements are not required to be made under oath, and hearsay evidence may be considered. The CANRB review is not considered an "adversary proceeding in a contested case" as that phrase is defined in the Missouri Administrative Procedure Act. *Lipic v. State*, 93 S.W.3d 839, 842 (Mo. App. E.D. 2002).

There is no time specified by which the CANRB must schedule this "hearing." In practice, it takes several months before such a hearing can be scheduled. Once the review takes place, the CANRB must make a decision within 7 days of the date of the review hearing. The accused must be notified of that decision within 35 days of the date of the review hearing. If aggrieved by the decision, the accused has sixty days to file a petition in the appropriate circuit court seeking a *de novo* judicial review.

Substantial delays in reaching this level of review themselves violate due process. In this case, through no fault of the individual respondents or the trial court, the summary judgment was not issued until almost three years after Mildred Jamison's and Betty Dotson's names were placed in the central registry. The U.S. Supreme Court has stated that "due process requires, *inter alia*, a hearing at a meaningful time." *Cavarretta*, 660 N.E.2d 250, 256 (Ill. App. 2 Dist. 1996),

quoting Cleveland Board of Education v. Loudermill, 470 U.S. 532, 547 (1985). Even apart from the facts of this case, the Court can take notice of the fact that trials commonly occur a year or more after cases are filed, given the need for completion of formal discovery and the difficulties in scheduling the trials themselves.

During this multi-year time period, irreparable damage can and does occur to citizens whose names are in the registry. Once information is divulged it cannot be retrieved. Central registry information is required to be kept in the personnel files of various employers and it is disclosed to potential employers and to private persons inquiring about institutions where they are thinking about placing a family member. The genie cannot be put back into the bottle. Having one's name cleared by the trial court does not "unring" the bell as to disclosures made during the years prior to the trial. The innocent will forever be identified in unknown files as persons who abuse or neglect children.

Appellant's reliance on *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) to justify post-deprivation hearings is misplaced. The government interest there arose from the government as employer, a factor not present here: "To require more than [an informal hearing] prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* at 546. Similarly, in *State ex rel. Donelon v.*

Division of Employment Security, 971 S.W.2d 869 (Mo. App. W.D. 1998), the court found that the Division of Employment Security, "as a branch of the government that serves the people and taxpayers of the state, does have a substantial interest in the immediate and effective discipline to promote efficiency, maintain morale and instill public confidence." *Id.* at 876. The government as employer has a need for pre-hearing deprivations that is not present here.

The facts in *Mathews v. Eldridge*, 424 U.S. 319 (1976), are typical of instances in which post-deprivation hearings were declared sufficient, because there the claimant's disability payments during the time he was wrongfully denied them would be recouped. *Id.* at 340. In cases like the one at bar, no one knows how many files contain information wrongfully identifying private citizens as child abusers, and there is no way to recoup the loss, as would be possible in cases involving money or tangible goods.

In Missouri, sex offenders, including rapists, are treated better than this. They do not have their names placed on any list prior to their being convicted of or pleading guilty to a sexual offense, or otherwise being afforded full due process rights. Mo. Rev. Stat. § 589.400 *et seq.*

In *Zinermon v. Burch*, 494 U.S. 113 (1990), the Supreme Court expressed its preference for predeprivation hearings, but noted two exceptions:

> In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking. See *Loudermill*, 470 U.S., at 542, 105 S.Ct., at 1493; *Memphis Light*, 436 U.S., at 18, 98 S.Ct., at 1564; *Fuentes*, 407 U.S., at 80-84, 92 S.Ct., at 1994-96; *Goldberg*, 397 U.S., at 264, 90 S.Ct., at 1018. Conversely, in situations where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake, see *Ingraham*, 430 U.S., at 682, 97 S.Ct., at 1418, or where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest, postdeprivation remedies might satisfy due process.

Id. at 132. The case at bar is not a "situation where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake," *see Ingraham v. Wright*, 430 U.S. 651 (1977) (public junior high school students not entitled to predeprivation hearing prior to being spanked on buttocks by wooden paddle), or a constitutional injury caused by a random or unauthorized governmental act.

Another exception to the predeprivation rule was noted in *Bell v. Burson*, 402 U.S. 535 (1971), a license-suspension case in which the Court held that "it is fundamental that except in emergency situations (and this is not one) due process requires that when a State seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for hearing appropriate to the nature of the

case' before the termination becomes effective." *Id.* at 542. In the case at bar, there is similarly no emergency requiring placement of a name in the registry. Emergency removals of abused or neglected children should and do take place long before the names of the alleged abusers are placed in the central registry, a process that takes weeks and sometimes months—long enough for a full due process hearing.

"Postdeprivation" due process "is an exception, and not the rule." *Wayfield v. Town of Tisbury*, 925 F. Supp. 880, 886 (D. Mass.1996).

B The Risk Of Error Under Existing Procedures Is Enormous, And Additional Procedural Safeguards Would Benefit Everyone, Including The State.

As discussed above, the damage wrought by disclosures wrongfully identifying citizens as child abusers, even when later rectified by court order, is enormous and irreparable. This section discusses the second prong of the *Mathews v. Eldridge* test—the risk of error under existing procedures and the value of additional procedural safeguards. Specific aspects of the current law that were argued by Jamison and Dotson and found by the trial court to be unconstitutional are addressed herein.

1 Delay In Obtaining Due Process.

While delay is a specific constitutional deficiency in the current Missouri central registry scheme, it is also the overarching constitutional problem. Accordingly, it has been discussed in Part II(A) *supra*, and those arguments will not be repeated here.

2 Failure To Observe Regular And Established Rules Of Evidence, Including Requiring Testimony To Be Under Oath, The Right Of The Accused To Compel The Testimony Of Witnesses To The Same Extent As The Division Can, And The Right To Cross-Examine Witnesses.

Determining whether abuse or neglect of a child has occurred is extraordinarily and almost exclusively a fact-intensive enterprise. In such cases, the Supreme Court has spoken forcefully of the need for observance of regular and established rules of evidence and the taking of evidence:

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. [citations omitted]. What we said in Greene v. McElroy, 360 U.S. 474, 496-497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959), is particularly pertinent here:

> ‘Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment***. This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, *** but also in all types of cases where administrative *** actions were under scrutiny.’
>
> Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.

Goldberg v. Kelly, 397 U.S. 254, 269-270 (1970).

In the case at bar, the trial court ruled that names of citizens should not be included in the central registry for purposes of dissemination to prospective employers prior to their opportunity for a due process hearing, which includes, among other things:

A) A neutral decision-maker;

B) Testimony under oath or affirmation by all witnesses;

C) Observance of regular and established Missouri rules of evidence;

D) The right of the accused to compel the testimony of witnesses to the same extent their testimony can be compelled by the Respondent;

E) The right to cross-examine all witnesses;

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Testimony under oath or affirmation. Under the current statute, no testimony is required to be under oath or affirmation until the *de novo* trial in circuit court. Requiring accusations to be under oath or affirmation is in the interests of both citizens and the state, and is relatively cost-free.

Observance of regular and established Missouri rules of evidence. Under the current statute, no rules of evidence are observed at any stage prior to the *de novo* trial. Respondents are aware of no Missouri statutory or case law that makes allowance for special hearsay rules in the case of *de novo* judicial review under Chapter 210. Accordingly, the trial court's ruling that regular and

established rules of evidence should obtain as a matter of constitutional law is already the practice in Missouri state courts. It should also be a requirement, as a matter of procedural due process, that objectionable hearsay should not be the basis, at any level of review, for inclusion in the central registry to the extent such inclusion impairs employment rights.

The right of the accused to compel the testimony of witnesses to the same extent their testimony can be compelled by the Division. Under the current statutory scheme, the accused are not permitted to compel the attendance of the alleged victim or of the reporter who made the hotline call. Section 210.152.5, Mo. Rev. Stat., outlines the procedures for a *de novo* judicial review. It provides that the "alleged perpetrator may subpoena any witnesses except the alleged victim or the reporter." This precludes even the taking of depositions of victims or the reporter by the accused. At least one court has concluded that an individual accused of committing child abuse or neglect is entitled to the "same protections in regard to the rights to compel and confront witnesses as are afforded to constitutionally protected interests in criminal prosecutions." *State v. Jackson*, 496 S.E.2d 912 (Ga. 1998); *see also Goldberg v. Kelly*, 397 U.S. at 269-270, discussed *supra*. In *Jackson*, an alleged child abuser brought a declaratory judgment action challenging the constitutionality of the statutory scheme providing for the establishment of a registry for reports of child abuse. The statute in question

provided that a child under the age of 14 could not be compelled to appear and testify at any administrative hearing to determine whether the evidence supported the classification assigned to the report, *e.g.*, unfounded (no credible evidence), confirmed (at least equal or greater credible evidence that abuse occurred) or unconfirmed (some credible evidence but not enough to classify report as confirmed). *Id*. at 914.

In holding that due process required that the alleged perpetrator be afforded the ability to compel the presence of witnesses and confront them, the Georgia Supreme Court noted that the "right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense. . . . This right is a fundamental element of due process of law." *Id*. at 915 (internal citations omitted). The court concluded that the need to insure that the witness' statement was under oath and subject to cross-examination was "at the very core of the concept of a fair hearing." *Id*. Because the court concluded that the hearing afforded to an alleged perpetrator under the Georgia statute was insufficient to protect that individual's rights, the court declared unconstitutional the entire act governing the Georgia registry. *Id*. at 917.

At least one other court has acknowledged an alleged perpetrator's right to confront the witnesses testifying against him, albeit in a slightly different context. In *South Carolina Dep't of Social Services v. Wilson*, 574 S.E.2d 730 (S.C. 2002),

the South Carolina Supreme Court considered what process was due to an alleged perpetrator of sexual abuse of a child at a hearing instigated by the department of social services to intervene and provide protective services to the child. At issue was whether the alleged perpetrator (who was the child's parent) had a right to be present during the child's testimony. The court concluded that in the absence of a particularized inquiry by the court as to whether the child would be traumatized by testifying in the father's presence, the father's due process rights were violated by his removal from the courtroom during her testimony. *Id*. In so holding, the court recognized that where important decisions turn on questions of fact, "due process often requires an opportunity to confront and cross-examine adverse witnesses." *Id*. The determination of whether an individual has committed child abuse or neglect turns entirely on fact. Moreover, because this determination largely involves private conduct, it also turns largely on the credibility of the witnesses. The *Wilson* case decided by the Supreme Court of South Carolina and the *Jackson* case decided by the Supreme Court of Georgia are authority to the effect that Missouri's blanket prohibition on compelling the presence of the victim and witness substantially increases the risk of an erroneous deprivation of an individual's rights.

Under current Missouri law, the state is under no such restriction. The circuit court, mindful of potential circumstances under which it would be unwise to

force youthful victims of abuse or neglect to undergo depositions or examination at trial by the accused, did not require that the accused be able to force the appearance of such witnesses. Thus the circuit court did not go as far as did the Georgia Supreme Court in *Jackson.* Rather, the circuit court held simply that the state should have no greater power to require the appearance of witnesses than does the accused. This requirement advances the search for truth in that it provides the same kind of evenhandedness present in all due process proceedings. It does not force the state to make its youthful witnesses available to a hostile parent or other alleged abuser.

The right to cross-examine all witnesses. Finally, under the current Missouri statutory scheme, cross-examination of witnesses is not allowed at any level, not even at the CANRB hearing, until the trial *de novo* in the circuit court. Under *Goldberg v. Kelly*, cross-examination of adverse witnesses is elemental. 397 U.S. at 269-270. Again, this rule does not require the division to produce youthful witnesses whom the division does not want cross-examined. It simply requires that if witnesses testify there should be an opportunity for cross-examination.

3 Failure To Use A Neutral Decision Maker.

In the case at bar, the names of the accused were placed in the central registry by the investigator who handled the case for the division from the

beginning. In *Goldberg v. Kelly*, the Supreme Court held that "an impartial decision maker is essential." 397 U.S. at 271. *See also People v. David W.*, 733 N.E.2d 206, 213 (N.Y. 2000) (finding that the "State did not bear the burden of proof at any proceeding before a neutral fact finder").

The CANRB, made up of volunteer lay persons appointed by the Governor, is by its very nature not constituted of persons like judges, professional hearing examiners or administrative law judges who are practiced in the skill of receiving and weighing evidence and in the art of evenhandedness. When these infirmities are added to the other deficiencies that inhere in CANRB hearings—testimony not under oath, allowance of hearsay, no cross-examination, no compelled testimony—it is apparent that the CANRB hearings do not constitute the "meaningful hearings" that the Constitution requires.

4 Use Of "Probable Cause" As A Standard Rather Than "Preponderance Of The Evidence."

Prior to August 28, 2004, when the 2004 amendments (House Bill 1453) went into effect, Missouri's statutory and regulatory framework provided that an individual would be identified as an alleged perpetrator of child abuse or neglect upon a finding of "probable cause" to believe that such abuse or neglect occurred. The "probable cause" standard was used throughout every level of review afforded to the alleged perpetrator by the statutory scheme both prior to and after the

inclusion of that individual on the central registry. Accordingly, the "probable cause" standard was used at every level to assess the Division's case against the individual respondents and their inclusion in the central registry, and the case at bar is unaffected by the 2004 amendments.

It seems clear that cases entering the system after August 28, 2004 will be assessed according to a "preponderance of the evidence" standard. *See* Mo. Rev. Stat. §§ 210.110(2), 210.152.2, 210.152.4. Unfortunately, it is not clear how those cases that entered the central registry before that date as "probable cause" cases are to be treated through the review and appeal process. Sections 210.152.2(1) and 210.152.4 appear to indicate that cases entering the system prior to August 28, 2004 would continue to be assessed throughout the review and appeal process under a "probable cause" standard.

Accordingly, the argument which follows relates to names placed in the central registry prior to August 28, 2004, as in the case at bar. Within 30 days after an oral report of abuse or neglect, the local office of the Division must make a determination on the hotline report unless "good cause" exists for failing to complete the investigation in 30 days. Mo. Rev. Stat. § 210.145. Although the Division must complete the investigation and make a determination within 30 days, the alleged perpetrator is not notified of the disposition until 90 days after the date of the hotline report. Mo. Rev. Stat. § 210.152.2. At that time, the alleged

perpetrator is notified either that the division has determined that probable cause exists or that there is insufficient probable cause of abuse or neglect. *Id.* If the Division determines there is probable cause, the Division retains identifying information regarding the abuse or neglect.

It is unclear from the statutes precisely when a finding of probable cause is entered into the central registry. However, presumably it occurs either at the 30-day conclusion of the investigation, when the information system must be updated to include the results of the investigation, or 90 days after the date of the hotline report, at which time the alleged perpetrator is notified that the report was either substantiated or unsubstantiated. The "central registry" is defined in the pertinent statute as "a registry of persons where the division has found probable cause to believe prior to the effective date of this section or by a preponderance of the evidence after the effective date of this section . . . that the individual has committed child abuse or neglect. . . ." Mo. Rev. Stat. § 210.110(2) (as amended).

Although an alleged perpetrator can seek administrative review from the county director for the division of family services and ultimately the CANRB, the CANRB must sustain the division's determination "if such determination was supported by evidence of probable cause prior to the effective date of this section or is supported by a preponderance of the evidence after the effective date of this section and is not against the weight of such evidence." Mo. Rev. Stat.

§ 210.152.4 (as amended). If the accused is aggrieved by a decision of the CANRB, that individual can seek *de novo* judicial review from the circuit court. The Missouri Court of Appeals for the Southern District has stated that the purpose of the *de novo* judicial review is to permit "the trial court to make an independent determination of probable cause to suspect an alleged perpetrator of child abuse based upon testimony and evidence." *Williams v. State, Department of Social Services, Division of Family Services*, 978 S.W.2d 491, 494 (Mo. App. S.D. 1998).

Several courts have concluded that at a minimum, due process requires that at some point during the review process, the state agency be required to prove abuse or neglect by a preponderance of the evidence. For example, in *Preisendorfer*, the Supreme Court of New Hampshire held that "due process requires that the preponderance of the evidence standard apply in any hearing to determine whether an individual's name should be added to the central registry."[7] *Preisendorfer*, 719 A.2d 590, 595 (N.H. 1998). The New Hampshire statute permitted the state agency to file a report in the state's central registry upon a showing of probable cause. *Id*. at 593.

[7]Although the *Preisendorfer* case was decided based on the due process clause of the New Hampshire Constitution, *see* 719 A.2d at 592, its logic is clearly applicable to claims premised upon the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The Supreme Court of New Hampshire concluded that this standard did not comport with due process. "Due process dictates the adoption of a minimum standard of proof that 'reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.'" *Id*. at 593. Unlike the preponderance of the evidence standard–which places the risk of error in roughly equal fashion–the probable cause standard places the brunt of the risk of error, if not the entire risk of error, on a person subject to inclusion in the registry. *Id*. at 594.

Other courts have also articulated the unfairness of minimal standards of proof such as the "credible evidence" and "probable cause" standards.[8] For example, in *Lee T.T. v. Dowling*, 664 N.E.2d 1243 (N.Y. App. 1996), the New York Court of Appeals concluded that due process required that the New York Social Services Department "substantiate reports of child abuse by a fair preponderance of the evidence before they may be disseminated to providers and licensing agencies as a screening device for future employment." *Id*. at 1252. The court outlined the dangers of a minimal standard of proof in this context. It noted that child abuse frequently involves private conduct and is based upon the reports

[8]*See e.g.*, *Cavarretta v. Department of Children and Family Services*, 660 N.E.2d 250 (Ill. App. 2 Dist. 1996) (equating "credible evidence" and "probable cause" standards of proof).

of minors or actions of a minor observed and interpreted by others. "There may be no supporting eyewitness testimony or objective evidence to support the report and therefore the evaluation of it may involve, to a large degree, subjective determinations of credibility." *Id*. at 1251. Under the "credible evidence" or "probable cause" standards, a fact finder might be tempted to rely on an intuitive determination, ignoring contrary evidence. *Id*. *See also Valmonte*, 18 F.3d at 1004 (finding "credible evidence" standard unacceptable because it resulted in many individuals being placed on registry who did not belong there).

As to citizens whose names were put in the central registry prior to August 28, 2004 in Missouri, the "probable cause" standard creates a far greater risk of error than many of the state statutory schemes because it does not appear that an alleged perpetrator is ever afforded a hearing or review at which the standard is proof by a preponderance of the evidence. Even at the level of *de novo* judicial review in the circuit court, the standard seems to be whether probable cause exists to suspect an alleged perpetrator of child abuse. *See Williams v. State, Department of Social Services, Division of Family Services*, 978 S.W.2d 491, 494 (Mo. App. S.D. 1998) (purpose of *de novo* judicial review is to permit "the trial court to make an independent determination of probable cause to suspect an alleged perpetrator of child abuse based upon testimony and evidence").

Thus, in Missouri, an individual accused of child abuse or neglect will be included on the central registry indefinitely, without there ever having been a determination by a preponderance of the evidence that such abuse or neglect occurred. There is no provision in the statutes for the removal of identifying records regarding a report for which the division determined that probable cause existed. *See generally* Mo. Rev. Stat. § 210.152 (delineating when reports are to be retained and removed).

The distinction between "probable cause" and "preponderance of the evidence" is significant because of the substantial difference it makes in the distribution of the risk of error, coupled with language in the statute that may lead to confusion. While the statute defines "probable cause" as "available facts when viewed in the light of surrounding circumstances which would cause a reasonable person to believe a child was abused or neglected" (Mo. Rev. Stat. § 210.110(10)), it does not define the ***quantum*** of proof that differentiates "probable cause" from other standards, such as "preponderance of the evidence." The cases frequently use the same language or language similar to that used in Mo. Rev. Stat. § 210.110(10), but they also demonstrate the unmistakable differentiations between the quantum of proof required under a "probable cause" standard and a "preponderance of the evidence" standard.

For instance, in *State v. Tokar*, 918 S.W.2d 753, 767 (Mo. banc 1996), this Court found that "probable cause to arrest exists when the arresting officer's knowledge of the particular facts and circumstances is sufficient to warrant a prudent person's belief that a suspect has committed an offense." And in *State v. Kampschroeder***,** 985 S.W.2d 396, 398 (Mo. App. E.D. 1999), the appeals court held that "[p]robable cause exists when the circumstances and facts would warrant a person of reasonable caution to believe an offense has been committed." This is language almost identical to that found in Mo. Rev. Stat. § 210.110(10).

The definition of "probable cause" does not end there, however. The ***quantum*** of proof for "probable cause" is emphatically less than for a "preponderance of the evidence." In *State v. Laws*, 801 S.W.2d 68, 70 (Mo. banc 1990), this Court defined the probable cause requirement as follows:

> The magistrate need only find a "fair probability" that contraband will be found, *id.;* it is not necessary to establish the presence of contraband either *prima facie*, or by a preponderance of the evidence, or beyond a reasonable doubt. *State v. Hall,* 687 S.W.2d 924, 929 (Mo. App.1985).

Similarly, the U.S. Supreme Court has held that the "level of suspicion" required for a probable cause finding "is considerably less than proof of wrongdoing by a preponderance of the evidence. We have held that probable cause means 'a fair probability that contraband or evidence of a crime will be found' (citations

omitted)." *United States v. Sokolow*, 490 U.S. 1, 7 (1989). And in *State v. Berry*, 801 S.W.2d 64, 66 (Mo. banc 1990), this Court noted:

> In *Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983), the plurality said that probable cause "does not demand any showing that such belief be correct or more likely true than false." Although no majority opinion from the United States Supreme Court has followed *Brown*, the Eighth Circuit has adopted *Brown's* definition in *United States v. Wayne*, 903 F.2d 1188, 1196 (8th Cir.1990).

Accordingly, when the definition of "probable cause" as found in Mo. Rev. Stat. § 210.110(10) and the cases is expanded to define the ***quantum*** of proof required, unmistakable differences between the standards of "probable cause" and "preponderance of the evidence" emerge.

As held by the cases cited above, the "preponderance of the evidence" standard correctly distributes the risk of error, while the "probable cause" standard does not.

C The State's Interests Are Accommodated And Even Advanced By The Decision Of The Trial Court.

The third factor to be considered under *Mathews v. Eldridge* is the state's interest.[9]

All sides agree that the state, as *parens patrae,* has a compelling interest in the protection of children from abuse and neglect. Nothing in the trial court's judgment infringes on this important state interest. The trial court's judgment is directed solely at use of the central registry to impair employment rights, and then only to the extent citizens' names are placed in the registry prior to their being afforded the opportunity of a full due process hearing.

1 The Circuit Court's Judgment Does Not Impair Law Enforcement Or Child Protection.

Adherence to constitutional mandates recognized by the trial court's judgment does not result in any impediment to law enforcement or child

[9] Appellant principally relies on *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532 (1985) to justify post-deprivation hearings. Its reliance is misplaced. The government interest there arose from the government as employer, a factor not present here: "To require more than [an informal hearing] prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* at 546.

protection. Under current law, the Division does not have the power to prosecute criminal cases, and does not have the power to place children in emergency or non-emergency protective custody (Mo. Rev. Stat. § 210.125.3). Nothing in the trial court's judgment impairs the division's ability to cooperate or participate in the prosecution of criminal cases or the protection of children. Under the judgment of the trial court, the division would continue to be allowed to collect information on abuse and neglect suspects and share it internally and with police, sheriffs, juvenile offices, grand juries, prosecutors and all other law enforcement functionaries. The trial court's judgment does not forbid maintenance of the central registry, even as it is presently constituted, for these purposes.

As to any instance of child abuse or neglect serious enough to warrant criminal charges, standard bond requirements, used by courts throughout Missouri, keep the criminally accused away from potential victims. And the central registry would continue to include any person who has pled guilty or been convicted of a host of crimes (Mo. Rev. Stat. § 210.110(2)), or waived his or her right to a due process hearing. The trial court's judgment requires only that citizens be afforded the "opportunity" for a due process hearing. Any child in danger would have already been removed pursuant to the emergency protective custody provisions available to physicians, law enforcement and juvenile authorities throughout the state. This removal or other provision for the child's safety would take place

weeks before the name of the child's alleged abuser is placed in the central registry.

The trial court's judgment, which simply forbids using the central registry as it is currently constituted to impair employment opportunities, is accordingly not the draconian measure appellant suggests. For instance, sex offenders in Missouri, including rapists, do not have their names placed on any list prior to their being convicted of or pleading guilty to a sexual offense, or otherwise being afforded full due process rights. Mo. Rev. Stat. § 589.400 *et seq.* Citizens like Mildred Jamison and Betty Dotson should be able to expect at least as much due process as the state affords to rapists.

2 The State's Interests Are Advanced When Due Process Is Advanced.

"[I]t is always in the public interest to prevent the violation of a party's constitutional rights." *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir. 1994). It does not advance the public interest in Missouri to inflict constitutional harm, in the form of publication of false positive conclusions resulting from a lack of due process, on citizens who have devoted their lives to caring for children. The state's legitimate interest in maintaining a list that is neither over-inclusive nor under-inclusive coincides with the interests of

the accused. Procedural due process, as set forth in the trial court's judgment, is the means to that end.

In providing for *de novo* judicial review for anyone whose name is in the central registry, the State of Missouri has acknowledged the overriding importance to all parties of getting at the truth before citizens are irrevocably branded as child abusers. Both appellant and the individual respondents agree that such a hearing is necessary; the primary issue in this case is when it should take place. The trial court decided that it should take place before citizens' names are disclosed as child abusers to potential employers. Its order and judgment went no further than that.

The judgment of the trial court allows for a list that can continue to be over-inclusive for law enforcement and child protection purposes, but must be subjected to the stricter scrutiny afforded by procedural due process before being used to impair employment rights.

CONCLUSION

The trial court's judgment declares the state's central registry scheme to be unconstitutional, to the extent it impairs employment rights, without first providing due process to the accused. The trial court's decision upholds the compelling interests of the accused without jeopardizing the state's compelling interests in law enforcement and emergency child protection, while correcting the enormous risk of

error brought about through the statute's failure to provide procedural due process. The trial court's judgment should therefore be affirmed.

Respectfully submitted this 1st day of June, 2006.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, pursuant to Rule 84.06(g), two copies of the foregoing brief and a copy of the brief on disk were hand-delivered, this 1st day of June, 2006, to:

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CERTIFICATE OF COMPLIANCE

Timothy Belz, attorney of record for the Respondents in the above-referenced appeal, certifies that

1. Respondent's Brief contains the information required by Rule 55.03;

2. Respondents' Brief complies with the limitations contained in Rule 84.06(b);

3. Respondents' Brief, excluding the cover page, certificate of service, this certificate, signature blocks and appendix, contains 13,561 words, as determined by the word count tool contained in Microsoft Word 2003 software with which this brief was prepared; and

4. The diskette accompanying this brief has been scanned for viruses and to the best knowledge, information and belief of the undersigned is virus free.

Dated: June 1, 2006

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